

No longer acceptable: the exclusion of the death penalty under international criminal law

Steven Freeland*

This article examines the position of the death penalty under international criminal law. It traces the evolution in thinking in terms of sentencing practices — from the inclusion (and implementation) of the death penalty in the Nuremberg and Tokyo War Crimes Tribunal statutes, to the modern day international criminal tribunals and courts, which are not mandated to impose the death penalty. This is considered within the broader context of the ‘internationalisation of justice’, which has emerged since the beginning of the 1990s. The article analyses the reasons for this evolution in sentencing, which include changes in human rights standards and societal values, and the developing rationales of international criminal justice, as well as more practical (resource-driven) considerations. The article also considers the implications of the various strategies implemented by a number of the international criminal tribunals to remit cases to national courts in appropriate circumstances, and how this may be contributing to the strong momentum towards abolition of the death penalty at the national level.

Introduction

On 2 September 1998, Jean-Paul Akayesu, the former Bourgemestre of Taba Commune in Rwanda, was convicted of genocide by the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR),¹ it having been proven beyond reasonable doubt that he had the requisite intention to ‘destroy’ the Tutsis (*dolis specialis*) (*Prosecutor v Akayesu*, 1998, Judgment). This was the first time that an international criminal tribunal had considered the meaning of the crime of genocide — the definition of which had been drawn from the 1948 Genocide Convention — and the first conviction at the international level for this crime. At the time, the Trial Chamber described the crime of genocide for which Akayesu had been convicted as the ‘crime of crimes’ (at [16]).

* Professor of International Law, University of Western Sydney; Visiting Professor of International Law, University of Copenhagen; Visiting Professional, the International Criminal Court, The Hague. Email: <S.Freeland@uws.edu.au>. This article was written as at August 2009. The author wishes to thank the anonymous referees for their comments. The article represents the author’s personal views.

1 International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR).

In addition, Akayesu was found guilty of other serious crimes, including one count of direct and public incitement to commit genocide and seven counts of crimes against humanity. In passing sentence one month later, the Trial Chamber imposed a notional life imprisonment against three of the convictions, and various prison sentences of either 10 or 15 years in relation to each of the others. In the end, the Trial Chamber ruled that all of these sentences should be served concurrently and that Akayesu should therefore receive ‘a single sentence of life imprisonment’ (*Akayesu*, Sentence). This was consistent with the powers of the ICTR in relation to sentence and punishment, which are that ‘the penalty imposed by the Trial Chamber shall be limited to imprisonment’ (ICTR Statute, Art 23(1)).

This outcome can be contrasted with the trials that had taken place before the Nuremberg and Tokyo Military Tribunals some five decades earlier.² The Charter of the Nuremberg Military Tribunal — which did not define or incorporate the crime of genocide, but still related to other very serious crimes³ — empowered that tribunal to pass sentence as follows:

... the Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just. [Art 27.]

Indeed, the Nuremberg Military Tribunal imposed a sentence of death on 12 defendants at the main trial. Of these 12 defendants, two were in fact not hanged

- 2 International Military Tribunal for the trial of the German major war criminals at Nuremberg (Nuremberg Military Tribunal); International Military Tribunal for the trial of the major war criminals in the Far East (Tokyo Military Tribunal).
- 3 Article 6 of the Nuremberg Military Tribunal Charter specifies the crimes for which the Nuremberg Military Tribunal had jurisdiction:
 - (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
 - (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
 - (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

— Hermann Göring committed suicide the night before the execution and Martin Bormann was tried and sentenced in absentia. However, the death penalty was carried out on the remaining 10 defendants who had been given that sentence.

Article 27 of the Charter of the Tokyo Military Tribunal was identical in terms to the provision of the Nuremberg Military Tribunal Charter. Seven defendants were sentenced to death by hanging by the Tokyo Military Tribunal, the sentence being carried out shortly after their trials.

Consequently, comparing the sentences handed down by the Nuremberg and Tokyo Military Tribunals with the much more recent decision in *Akayesu*, it can be seen that the attitude towards the death penalty within the context of international criminal justice has changed. The recently established international criminal tribunals have more limited sentencing powers and are unable to impose a death sentence. This article offers some reasons as to why the death penalty now no longer features as a characteristic of international criminal justice.

An evolving process of the ‘internationalisation of justice’

These differing approaches as to an appropriate sentence for those convicted of the most serious international crimes are one aspect of the evolution of international criminal justice that has taken place over the 20th century, and more particularly over the past 60 years. This process of the ‘internationalisation of justice’ has witnessed some failed attempts, remarkable successes, long periods of inaction and, more recently, the establishment of a range of different mechanisms designed to enforce still-evolving concepts of justice.

Towards the end of the 20th century, and leading into the current decade, this process has seen significant development, culminating (thus far at least) in the establishment, as from 1 July 2002, of the world’s first ever permanent international criminal court, the International Criminal Court (ICC). This process of internationalisation has evolved in tandem with the development of the principles of international human rights law, thus transforming the attitude towards the death penalty under international law. A chronology of this process of internationalisation is set out in the following section, followed by a brief description of the relevant international human rights instruments.

Prior to the Second World War

Even before the Nuremberg and Tokyo Military Tribunal trials, there had been some (unsuccessful) attempts to establish mechanisms of international criminal justice. Once victory by the Allied and Associated Powers seemed likely during the First World War,

they began to publicly call for the punishment of war criminals. For example, it was reported in the *Times* (London) and the *New York Times* in October 1918 that the French Government, in response to a request by the Germans for an armistice, had declared that:

... conduct which is equally contrary to international law and the fundamental principles of all human civilization will not go unpunished ... the authors and directors of these crimes will be held responsible morally, judicially, and financially. [Quoted in Jørgensen 2000, 5.]

At the conclusion of the First World War, the Treaty of Versailles provided for the prosecution of 'persons accused of having committed acts in violation of the laws and customs of war' (Art 228). More specifically, the Allied and Associated Powers publicly arraigned William II of Hohenzollern, formerly the German Emperor (Kaiser), 'for a supreme offence against international morality and the sanctity of treaties' (Art 227).⁴ The Treaty of Versailles provided for a special international tribunal to be constituted, comprising judges from the United States, Great Britain, France, Italy and Japan, to try the Emperor. The proposed tribunal had the following sentencing powers:

... in its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. [Art 227.]

However, by the time the Treaty of Versailles was in force, the Emperor had already sought refuge in The Netherlands, which did not agree to surrender him for prosecution, instead regarding itself as a 'land of refuge for the vanquished in international conflicts' (Jørgensen 2000, 7). A trial in absentia was considered as futile and, as a result, the international tribunal was not established. The Emperor remained in The Netherlands until his death in 1941.

The Treaty of Versailles also envisaged the establishment of other military tribunals. Pursuant to Art 228 of the treaty, the German Government was deemed to have

4 On the first day of the First World War, the German Emperor had reportedly written in a letter to the Austrian Emperor:

Everything must be drowned in fire and blood. It is essential to kill men and women, children and old men, not to leave standing a single house or a single tree. By these terrorist methods, the only methods capable of frightening such a degenerate people as the French, the war will be ended in less than two months: while if I take considerations of humanity into account, the war will last several years.

See Jørgensen 2000, p 4 and fn.

expressly recognised the right of the Allied and Associated Powers to bring persons accused of having committed acts in violation of the laws and customs of war before their own military tribunals. Persons found guilty by those tribunals would be 'sentenced to punishments laid down by law'. In practice the German leadership did not accept this, and a compromise was eventually reached by which the Germans themselves would try alleged war criminals. However, over time it became increasingly clear that these trials fell far below the expectations of the Allied and Associated Powers, and that the sentences imposed were, in their opinion, grossly inadequate.⁵

In 1920, the Treaty of Sèvres, which covered the terms of peace reached with Turkey, provided for war crimes trials to be held—in relation not only to the deaths of Allied soldiers or civilians in occupied territories, but also to those of many thousands of Armenians that had taken place under the Ottoman Empire.⁶ This treaty was never ratified by Turkey and never came into force. It was subsequently 'replaced' (Schabas 2001, 4) in 1923 by the Treaty of Lausanne, which contained a 'Declaration of Amnesty' for all such offences committed between 1 August 1914 and 20 November 1922.

In 1937, a treaty was adopted by the League of Nations that envisaged the establishment of an international criminal court. The Convention for the Creation of an International Criminal Court (1937 ICC Treaty) provided for the death penalty, but also allowed the state that was to execute the sentence on a convicted person to substitute 'the most severe penalty provided by its national law which involves the loss of liberty' if it so wished (Art 41).⁷ However, this instrument was not widely supported and also never came into force.

- 5 Between 23 May and 16 July 1921, a number of German war crimes trials were conducted under German national law in the Leipzig Criminal Senate of the Imperial Court of Germany. The Allied countries had prepared an initial list of some 900 persons to be tried by that court, which was over time reduced to about 40 individuals. In the end, 12 men were tried, with six being convicted. However, the conduct of these trials was 'very different from the trials expected by the public after the Armistice of 11th November 1918' (Mullins 1921, 23). The sentences delivered by the seven German judges were widely regarded as being too lenient in the circumstances, and those who had been on trial were considered in Germany as being war heroes. As a result, in the following year, the Allied countries demanded that the Leipzig trials should not continue and that Germans accused of war crimes should instead be tried before an international tribunal to be established under the Treaty of Versailles. As noted above, this tribunal never came into existence.
- 6 Article 230 of the Treaty of Sèvres provided for the establishment of a tribunal to try persons responsible for 'massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914'.
- 7 For a discussion of the terms of the 1937 ICC Treaty, see Hudson 1938.

The period immediately following the Second World War

This situation changed markedly following the end of the Second World War, although the agreement to establish the Nuremberg and Tokyo Military Tribunals only came relatively late in the piece. The Allies, with the exception of the United States, had initially been of the opinion that an international judicial process was not appropriate. This was only partially due to the fact that such an approach was unprecedented; it also stemmed from their more 'extreme' views as to how such persons should be brought to account. The British Government had, for example, instituted a formal policy of 'summary execution' of enemy leaders in 1943, which remained in place until the end of the war (Overy 2003, 3–4).

The terms of the Nuremberg Military Tribunal Charter were the subject of a series of negotiations involving the Allied Powers and were finalised in 1945 at the International Conference on Military Trials (London Conference). During these negotiations, the various drafts of the document each provided for the imposition of a sentence of death, without raising any controversy. While there were initially some disagreements regarding the details of those provisions specifying punishment, these did not relate to the death penalty, but rather to other issues, including the power to also impose a pecuniary punishment and the power to commute a sentence.

In the end, principally in line with the viewpoint of the United States, a public and (largely) transparent international judicial process was established involving military tribunals having a mandate and procedural framework that largely reflected 'Western notions of justice' (Overy 2003, 4).

An era of impunity

Despite the (generally) positive steps made by the Nuremberg (in particular) and Tokyo Military Tribunals regarding the formulation of principles of international criminal law, it would take almost 50 years until the next formative stage in the development of international criminal justice was to emerge.

There had been some suggestions in the early 1950s that a permanent international criminal court should be established (Crawford 2003, 110), either as a separate institution or as part of a treaty regime focused on particular crimes, but this did not eventuate. The 1948 Genocide Convention provided as follows:

... persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. [Art 6.]

In the same resolution in which it approved the text of the 1948 Genocide Convention, the United Nations General Assembly expressed the view that, over time, an 'increasing need of an international judicial organ for the trial of certain crimes under international law' would develop (United Nations General Assembly Resolution 260 (III) B, [2]). Accordingly, it invited the International Law Commission (ILC) to:

... study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. [United Nations General Assembly Resolution 260 (III) B, [3].]

Acting on this invitation, the ILC quickly concluded that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible. The United Nations General Assembly then established a committee to prepare proposals relating to the establishment of such a court (United Nations General Assembly Resolution 489 (V), [1]).⁸

During the course of finalising its drafts, the ILC engaged in lengthy discussions about the nature of the penalties that should be included. Although there was some divergence of opinion as to the precise wording, and indeed whether a maximum penalty should be expressly specified at all, there was general agreement that the proposed court should have the power to impose the death penalty in appropriate circumstances. Indeed, it was argued by some members that the omission of a reference to penalties would be a 'retrograde step' in comparison to the Nuremberg Military Tribunal Charter (Ricardo J Alfaro of Panama, in ILC (1951), 254, [107]); that 'the crimes concerned were so serious that death would not be too severe a punishment for them' (J P A François of The Netherlands, in ILC (1951), 252, [90]); and that failure on the part of the ILC to prescribe the death penalty 'would suggest that it disapproved of the penalties imposed by the [Nuremberg Military] Tribunal' (J P A François, in ILC (1951), 255, [142]).

One ILC member went so far as to suggest that those states that did not have, or had recently abolished, the death penalty in their domestic laws (for example, Brazil) would willingly (*re*)incorporate that penalty into its national legislation for these crimes, 'for philosophical reasons connected with the concept of educative or corrective penalties' (Gilberto Amado of Brazil, in ILC (1951), 253, [103]). In the end, however, Art 5 of the draft statute finalised by the ILC left it to the court to decide

8 The committee was initially comprised of representatives of 17 states: Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, The Netherlands, Pakistan, Peru, Syria, the United Kingdom of Great Britain and Northern Ireland, the United States and Uruguay.

the penalty, depending on the gravity of the crime (see the report by J Spiropoulos, Special Rapporteur, in ILC 1954, 121).

Shortly afterwards, the United Nations General Assembly halted the drafting process altogether (see United Nations General Assembly Resolution 897 (IX), [3]; United Nations General Assembly Resolution 898 (IX), [2]). The spectre of *realpolitik* had emerged with the onset of the Cold War, making it impossible for the international community to find the common will to build upon the foundations laid by the Nuremberg and Tokyo Military Tribunal processes.

Over the ensuing decades, an era of 'impunity for the perpetrators of these [international] crimes' (Rome Statute, preamble, [5]) took hold, which would not be challenged to any significant degree until after the fall of the Berlin Wall in November 1989. During this period, atrocities took place in countries around the globe, including the Soviet Union, Uganda, Nigeria, Argentina, Bangladesh, East Timor, Algeria, Cambodia and Iraq. However, for all intents and purposes, these crimes were not investigated, let alone punished, by a court of law.

Indeed, it has been estimated that approximately 170 million people were killed during the period 1945 to 1990, with little if any accountability (Cherif Bassiouni 1998; see also Freeland 2006). In certain respects, it was as if the principles that had emerged from the Nuremberg Military Tribunal process, as well as the 1948 Genocide Convention, were treated as ends unto themselves — sitting on the shelf — with little tangible action to address the commission of such crimes in a practical sense.

There were only a few relatively minor steps taken in this regard by the international community during this lengthy period of (virtual) inaction. A treaty was finalised specifying that statutory limitations under national law were inappropriate and should not be applicable to war crimes and crimes against humanity, which were described as 'among the gravest crimes in international law' (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, preamble, [4]). Yet, there was an almost total lack of political will by most countries to prosecute, within their respective national court systems, individuals suspected of committing such crimes over more than four decades.

The prosecution and subsequent conviction of Otto Adolf Eichmann by the Israeli District Court in *Attorney-General of the Government of Israel v Eichmann*, 1961⁹ (affirmed

9 Eichmann was prosecuted under Israeli law (the 1951 Nazi and Nazi Collaborators (Punishment) Law) for war crimes, crimes against the Jewish people (the definition of which was modeled on the definition of genocide in the 1948 Genocide Convention) and crimes against humanity.

by the Israeli Supreme Court the following year in *Eichmann v Attorney-General of the Government of Israel*, 1962), was one of the very few exceptions to this failure to act. Following the dismissal of his appeal, the death sentence by hanging imposed on Eichmann was carried out on 31 May 1962. Despite the fact that it still remains legal under Israeli national law to impose a death sentence for 'exceptional crimes' (Amnesty International 2008), this has been the only civil execution ever carried out in that country, which has a general policy of not instituting the death penalty.

Another example (of sorts) of an attempt during this period to prosecute those alleged to have committed international crimes followed the fall of the Khmer Rouge regime in Cambodia. By most estimates, almost two million people, representing over 20 per cent of the total population of the country at the time, had died directly as a result of the four-year reign of terror between 1975 and 1979 (Yale University 2009).

Following Vietnam's invasion of Cambodia, the Vietnamese authorities established a revolutionary people's tribunal, which in 1979 tried, convicted and imposed a death sentence on Khmer Rouge leader Pol Pot and his deputy Prime Minister. However, this 'trial' and sentence had not been preceded by any semblance of due process, had been held in absentia, and was not recognised internationally as being credible. In any event, the accused were by that time already safely in Thailand, thus rendering futile any attempt to have them extradited back to Cambodia.

Much later, in 1987, Klaus Barbie, who had been the head of the Gestapo in Lyons from November 1942 to August 1943 and was known as the 'Butcher of Lyons', was convicted by the Rhône Cour d'assises on 17 counts of crimes against humanity. His appeal was dismissed by the French Court of Cassation (*Fédération National des Déportés et Internés Résistants et Patriotes v Barbi*, 1988). By the time that he was charged and convicted, the death penalty was no longer available under French national law¹⁰ and Barbie was instead sentenced to life imprisonment.

Apart from these isolated examples, however, there was a lack of credible action on the part of national jurisdictions to deal with the perpetrators of serious crimes and, coupled with the fact that there were also no international mechanisms of criminal justice, this led to an acknowledgement by the United Nations General Assembly in 1970 that:

10 France had abolished the death penalty for all crimes within its national law in 1981 (Amnesty International 2008).

... many war criminals and persons who have committed crimes against humanity are continuing to take refuge in the territories of certain States and are enjoying protection. [United Nations General Assembly Resolution 2712 (XXV), [1].]

A new era of international justice — the 1990s and beyond

It was not until the shackles of the Cold War were loosened in the early 1990s that the United Nations was able to play a more active role in addressing international crimes, albeit *after* the fact. Faced with the genocides both in Rwanda and in the former Yugoslavia — each of which took place ‘under the watch of the [United Nations] Security Council and United Nations peacekeepers’ (United Nations General Assembly 2009, [5]) — the United Nations Security Council, acting under its powers pursuant to Ch VII of the United Nations Charter,¹¹ established two ad hoc tribunals to prosecute the perpetrators of serious crimes committed during those conflicts.¹²

Even though there was a clear recognition that such crimes already existed in international law, there was, understandably, only limited expertise in the area of international criminal law at the time these tribunals were established. For all intents and purposes, there had been no ‘practice’ of international criminal law for two generations. Now, in the drafting of the statutes of these tribunals, many issues had to be addressed, in the context of a different world from the time that the powers of the military tribunals had been designed.

Of course, an important element in the structure of these new tribunals was the penalties that each could impose.¹³ As noted above, this does not include the death penalty. Instead, the International Criminal Tribunal for the former Yugoslavia (ICTY)

11 Chapter VII of the United Nations Charter (Arts 39–51) gives the United Nations Security Council certain powers ‘with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’: United Nations Charter, Ch VII, title. This was the first time that these powers had been used to establish ad hoc international criminal tribunals. In early cases before each of the ad hoc tribunals, it had been argued that they were established unlawfully by the United Nations Security Council. In both cases, these claims were dismissed: see *Prosecutor v Tadić*, 1995 (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction); *Prosecutor v Kanyabashi*, 1997 (Decision on Defence Motion on Jurisdiction).

12 These are the International Criminal Tribunal for the Former Yugoslavia, which was formally established pursuant to United Nations Security Council Resolution 827, and the ICTR.

13 See ICTY Statute, Art 24 and ICTR Statute, Art 23.

and ICTR statutes both specify that the sentences were limited to ‘imprisonment’, as well as some possible additional sanctions in appropriate circumstances.¹⁴

The decision to exclude any power to impose the death penalty within the terms of the ICTY and ICTR statutes was not, however, unanimous. It was regarded as important to specify that each tribunal should take cognisance of the relevant national sentencing practices when imposing sentences, among other things so as to assuage concerns regarding the application of the principle of legality (Cryer, Friman, Robinson and Wilmshurst 2007, 394). In Art 24 of the ICTY Statute, for example, the tribunal is directed that:

1. ... In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

This initially gave rise to certain uncertainties in relation to the death penalty. In *Prosecutor v Stakić*, 2003, it was asserted that, since the particular crimes for which the accused was convicted would have attracted either a prison sentence of not less than five years or the death penalty under the Criminal Code of the Socialist Federal Republic of Yugoslavia (with a discretion to substitute the death penalty with a sentence of 20 years’ imprisonment), then the imposition by the ICTY of a sentence of life imprisonment would contravene the principle of legality.¹⁵ This was rejected by the tribunal, which also made the point that, in any event, the death penalty could no longer be imposed in the states of the former Yugoslavia, due to a Council of Europe requirement.¹⁶

Similar provisions (referring to the general practice in Rwanda) are found in the ICTR Statute (Art 23(1)). Despite the reference in these provisions to the relevant national

14 For example, Art 24(3) of the ICTY Statute provides that:

... in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

See also ICTR Statute, Art 23(3).

15 *Stakić*, 2003, at [889].

16 *Stakić*, 2003, at [890]. Council of Europe Resolution 1044 (1994) obliged all new member states to sign and ratify Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty and to introduce a moratorium on executions. See also *Prosecutor v Stakić*, 2006, at [398].

sentencing practices, however, the ad hoc tribunals have concluded that they are not actually bound by those practices, although they must 'consider' them.¹⁷

At the time that the ICTR Statute was finalised — and also at the time of the conviction and subsequent sentencing of Jean-Paul Akayesu — the national courts of Rwanda had the power to impose a sentence of death.¹⁸ When the United Nations Security Council voted to establish the ICTR (United Nations Security Council Resolution 955), Rwanda was (coincidentally) a non-permanent member of the Council. The vote at the United Nations Security Council to establish the ICTR was 14 in favour and one (Rwanda) against.

Ironically, therefore, although it was in favour of the creation of an international criminal tribunal to examine the atrocities that had taken place in its territory during 1994 and to prosecute the perpetrators of those crimes — indeed, the Rwandan Government had called for the establishment of an international tribunal as quickly as possible — Rwanda was opposed to the powers of the tribunal itself. This was for a number of reasons, but among the most significant was its view that the death penalty should be an integral part of any system of justice that was to be established.

Notwithstanding these concerns, however, by the time that these new tribunals were to be established, international human rights standards restricting the use of

17 See, for example, *Prosecutor v Kristić*, 2004, in which the Appeals Chamber of the ICTY quotes with approval the conclusion of the ICTY Trial Chamber in *Prosecutor v Kunarac*, 2001 (at [829]), which confirmed that (at [260]):

Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.

18 Rwanda only abolished the death penalty for all crimes within its national law in 2007: Amnesty International 2008. By contrast, the death penalty was abolished in most of the republics of the former Yugoslavia (apart from Bosnia and Herzegovina) by a constitutional amendment in 1977: see *Prosecutor v Kunarac*, at [831]. In fact, the ICTY has found that the (subsequent) abolition of the death penalty also in Bosnia and Herzegovina was a factor to be taken into account when imposing a prison sentence: see *Prosecutor v Rajić*, 2006, Sentencing Judgment, at [175]–[176].

the death penalty had developed, and the legal context relating to sentences for international crimes had thus changed significantly from the position that prevailed in the period immediately following the Second World War (this is discussed further below).

This is also reflected in the fact that, in the 15 years since the establishment of the ad hoc tribunals, a number of other international/internationalised criminal tribunals have also been established to prosecute the perpetrators of international crimes,¹⁹ none of which allow for the imposition of the death penalty.²⁰

The position is similar with respect to the ICC. At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998 Rome Conference), several complex questions were still to be finalised. These discussions were at times tortured and acrimonious, not the least because many of the states represented there had not participated in the preliminary drafting and negotiation sessions and were thus confronted with a detailed draft, perhaps even for the first time (Kalivretakis 2001, 697–98). Right up until the final vote at the 1998 Rome Conference, there remained a number of significant issues — particularly in relation to the extent of the court’s proposed jurisdiction and its relationship with the United Nations Security Council — with which some states had great difficulty. In the end, however, the 1998 Rome Conference agreed on the final terms of the Rome Statute, albeit not unanimously.²¹

19 These include the Special Court for Sierra Leone, the Extraordinary Chambers for Cambodia, the Serious Crimes Panels for Timor-Leste and, most recently, the Special Tribunal for Lebanon. Even more recently, there has even been a suggestion to establish another international tribunal to try those persons currently detained at Guantánamo Bay (Mettraux 2009) and (once again) in relation to the violence that took place in East Timor in 1999 (Vaswani 2009).

20 In the case of the Special Tribunal for Lebanon, for example, Lebanese criminal law will be applied by the tribunal, subject to the exclusion of penalties such as the death penalty and forced labour, which are otherwise applicable under Lebanese law. Instead, Art 24(1) of the statute of the Special Tribunal for Lebanon provides that the tribunal has the following sentencing powers: ‘The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years.’

In relation to Lebanese domestic law, in 2008 the Minister of Justice submitted a draft law proposing that the death penalty be abolished: see Amnesty International 2009a, 9.

21 Of those represented at the 1998 Rome Conference, 120 states voted to adopt the Rome Statute. There were 21 abstentions and seven states — China, Iraq, Israel, Libya, Qatar, Yemen and the United States — voted against the resolution. For details of the 1998 Rome Conference, see the website of the Conference at <www.un.org/icc/index.htm>.

In relation to the appropriate penalty to be included in the Rome Statute, the view ultimately prevailed that the death penalty should not be included. However, this was not unanimous, and remained a controversial issue. Some states claimed that inclusion of the death penalty was an essential element in establishing the credibility of the court (Cryer, Friman, Robinson and Wilmshurst 2007, 394), and that it would promote the deterrence aspects of the court's operation as a way of 'contribut[ing] to the prevention of such [international] crimes' (Rome Statute, preamble). Other states asserted that if the Rome Statute were to be considered as 'representative' of all systems, it should include the death penalty.

In the end, however, predominantly at the insistence of European states, the decision was taken that, despite the *sui generis* nature of the ICC, the Rome Statute should reflect the trend adopted in the other contemporary mechanisms of international criminal justice on this issue. Article 77(1) of the Rome Statute thus provides that the ICC may impose one of the following penalties on a convicted person:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.²²

However, given the need to find a compromise in order to finalise the terms of the Rome Statute, an additional provision was included. Article 80, which is headed 'Non-prejudice to national application of penalties and national laws', provides as follows:

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

22 In addition, Art 77(2) provides that:

In addition to imprisonment, the Court may order:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Moreover, the court is also empowered to 'make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation': Rome Statute, Art 77(2). In appropriate circumstances, these reparations may be made through a trust fund established pursuant to Art 79 of the Rome Statute.

Nonetheless, there is no doubt that the Rome Statute excludes the death penalty. This is now a fundamental characteristic of international criminal justice, unlike the time of the Nuremberg and Tokyo Military Tribunals. It is worthwhile noting that this has not, however, deterred some states that still retain the death penalty within their national laws (for example, Japan) from becoming states parties to the Rome Statute.

Reasons for the move away from the death penalty under international criminal justice

The exclusion of the death penalty from the structure of the more recently created mechanisms of international criminal justice has come about for a number of reasons. Some of these are briefly raised below.

Emerging human rights standards

As noted above, initially in response to the horrors that took place during the Second World War, a detailed framework of formalised human rights standards has developed over the past 60 years. In 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly (United Nations General Assembly Resolution 217A (III)). Article 3 of the UDHR provides that: 'Everyone has the right to life, liberty and security of person.'

Building upon Art 3 of the UDHR, both the 1950 European Convention on Human Rights (ECHR) and the 1966 ICCPR confirm the existence of a legal 'right to life'.²³ However, in relation to the use of the death penalty, both of these instruments only impose restrictions, but do not abolish it. For example, Art 6(2) of the ICCPR provides that:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant

23 See ECHR, Art 2 and ICCPR, Art 6. Article 2(1) of the ECHR provides as follows:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.²⁴

Over time, however, as the moral and societal values of many of the world's communities changed in relation to the imposition of capital punishment within their national legal systems, the restrictions in these instruments that related to the death penalty were also strengthened. Pursuant to optional protocols in 1983²⁵ and

24 The remainder of Art 6 of the ICCPR provides as follows:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- ...
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

25 The 1983 Sixth Protocol to the ECHR provides as follows:

Article 1 — Abolition of the Death Penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2 — Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

1989²⁶ respectively, it was provided that the death penalty could only be imposed ‘in time of war’. Subsequently, a further protocol to the ECHR in 2002 banned the use of the death penalty ‘in all circumstances’.²⁷

It therefore would have been inconceivable for the United Nations, and the European states (some of which played a significant role in the establishment of the new international criminal tribunals), to facilitate the establishment of international judicial processes that would have contemplated the use of the death penalty. Many of those involved with the negotiation and drafting of the various statutes of these tribunals came from national jurisdictions where the death penalty had already been abolished, in line with the development of international human rights principles. This would also apply to judges, officials and professional personnel working in these institutions.

- 26 See United Nations General Assembly Resolution 44/128. It should be noted, however, that this resolution was not adopted unanimously — the vote was 59 in favour, 29 abstentions and 48 against. The 1989 Second Optional Protocol to the ICCPR provides as follows:

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

...

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

- 27 The 2002 Thirteenth Protocol to the ECHR provides as follows:

The member States of the Council of Europe signatory hereto,

...

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1 — Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

There would therefore have been insufficient political support for the establishment by the United Nations of mechanisms of international justice that could impose such a penalty, notwithstanding the serious nature of the crimes that were to be investigated and prosecuted. In a similar vein, there would no doubt have been considerable reluctance among many countries — particularly those that were already opposed to the death penalty — to cooperate with, or surrender people to, an international tribunal that could impose such a sentence.

The United Nations General Assembly continues to raise the issue of the death penalty. In 2007 (United Nations General Assembly Resolution 63/168; this was reaffirmed in 2008), it called upon states that still retained the death penalty:

- (c) To progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed;
- (d) To establish a moratorium on executions with a view to abolishing the death penalty ... [United Nations General Assembly Resolution 62/149.]

This evolution of international human rights principles, and the role played by the United Nations, towards the prohibition of the death penalty represents the primary reason why the mechanisms of international criminal justice that have emerged since the early 1990s do not allow for such a sentence.

Changing societal values and a trend towards abolition at the national level

As referred to above, the attitude of general civil society over the past 60 years has changed with respect to the death penalty, a phenomenon that has seen a broader movement towards an abolitionist approach to the death sentence in many national jurisdictions. This trend continues to the present day. For example, according to Amnesty International, by 1977, only 16 countries had abolished the death penalty for all crimes. As of December 2008, that figure stood at 92 and 'more than two thirds of the countries in the world [have] abolished the death penalty in law or practice'. In 2009, for example, both Togo and Burundi abolished the death penalty and other African countries, such as Mali, are currently in the process of reviewing their national laws with a view to removing the death penalty (Amnesty International 2009b, 9).

This is not, however, the same as suggesting that the death penalty is now unlawful under customary international law. Such arguments continue to be raised (Amnesty International 2009a, 7), with the main propositions being that the death penalty violates the right to life (but see above) and/or the prohibition of cruel and unusual

or inhuman treatment or punishment.²⁸ With respect to the latter prohibition, it is true that the ‘death row phenomena’ had in 1989 already been held by the European Court of Human Rights to represent a breach in particular circumstances,²⁹ but this does not relate to the death penalty per se.

Indeed, if one were to apply the classic description of what constitutes a rule of customary international law, as stated by the International Court of Justice in *Federal Republic of Germany v Denmark* and *Federal Republic of Germany v The Netherlands*, 1969 (*North Sea Continental Shelf* cases),³⁰ it would be quite clear that the argument that the death penalty is illegal is unlikely to prevail. The court confirmed that customary international law evolves over time³¹ and is derived from sufficient (in the circumstances) evidence of both the ‘settled practice’ of states and *opinio juris* (recognition as law), which it described as ‘a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’ (at [77]).

28 See, for example, Art 7 of the ICCPR, which provides inter alia that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

29 See *Soering v United Kingdom*, 1989. In this case, the court was considering Art 3 of the ECHR.

30 See the *North Sea Continental Shelf* cases, at [77]. There have, of course, been earlier definitions of international custom, some dating back to early international law treatises: see Ochoa 2007, 122 and fns. See also Zartner Falstrom 2007, 291 for a detailed description of the work of Alberico Gentili (1552–1608), an early international lawyer who published a series of books in which he prescribed 10 principal rules relating to the application of international law, which also related to the development of principles of custom.

31 There has, however, been at least one generally accepted instance of what some commentators refer to as ‘instant’ customary law. In October 1957, the Soviet Union launched *Sputnik I* into outer space. This was the first man-made object to orbit the Earth. Almost immediately, important principles of the international law of outer space were born — in particular, the so-called ‘non-appropriation’ and ‘freedom’ principles, subsequently reflected in Arts I and II of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, which respectively provide inter alia that ‘[o]uter space ... shall be free for exploration and use by all States ... and there shall be free access to all areas of celestial bodies’ (Art 1) and ‘[o]uter space ... is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means’ (Art 2). As Judge Lachs of the International Court of Justice has observed:

The first instruments that men sent into outer space traversed the air space of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be *established and recognised as law within a remarkably short period of time*. [*North Sea Continental Shelf* cases, dissenting Opinion of Judge Lachs, at [230]; emphasis added.]

As such, the traditional view of customary international law is that it encompasses an objective element, as well as a subjective or 'psychological' element (Koppe 2006, 166). Much has been written about these two elements and how they should be properly formulated,³² which is also relevant to the process by which they may be adduced in relation to a specific customary rule. As noted by the International Court of Justice:

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States. [*Libyan Arab Jamahiriya v Malta*, 1985 (*Continental Shelf* case), at [27].]

When one looks to the actual practice of states, certainly, as noted above, there are many countries that have abolished the death penalty, and there are a number of international instruments that also reflect this abolitionist approach. Yet, it is undeniable that many countries still retain, and use, the death penalty. Amnesty International has estimated that, in 2008, at least 2390 people were known to have been executed in 25 countries and that at least 8864 people were sentenced to death in 52 countries around the world (Amnesty International 2009a). In the light of this, it would be very difficult to argue successfully that either necessary element for the establishment of a principle of customary international law would be satisfied.

Rather, as noted earlier, there is an undeniable trend towards abolition, so that the illegality of the death penalty might more accurately be described as an 'emerging norm' of international law. It is this trend itself that was one of the reasons that the death penalty was not incorporated into the structure of international criminal justice that has developed since the 1990s. The exclusion of the death penalty from the statutes establishing the mechanisms of international criminal justice certainly does give further momentum to the developing nature of this norm. However, we are simply not there as yet as far as being definitive as to the illegality of the death penalty under customary international law.

The need for resources — both financial and otherwise

The mechanisms of international justice are expensive to establish and maintain. By their very nature, they typically involve long, difficult investigations and lengthy (certainly

32 For example, in 1987, a group of US international lawyers produced the *Restatement of the Law: Third Restatement of US Foreign Relations Law*, in which (at ss 102(2)) they define customary international law as the law that 'results from a general and consistent practice of states followed by them from a sense of legal obligation' (American Law Institute 1987, 165). This description has subsequently been regarded by some commentators as accurately specifying the necessary prerequisites for the formation of customary international law: see, for example, Cash 2007, 592.

in comparison to most trials under national legal systems) trials. These international tribunals are largely reliant on funding from other countries. If they were to have the power to impose the death penalty, it would be difficult, if not impossible, to obtain funding from countries that are opposed to and/or have abolished the death penalty.

Similarly, it would be difficult to attract international judges from countries that have abolished the death penalty. It seems that, at least in those countries, there is a solid consensus among judges on the issue. Naturally, however, such concerns do not arise where trials are held within national criminal justice systems — such as in Iraq — before local judges only.

The rationales of punishment in international criminal law

The mechanisms of international criminal justice established since the 1990s were a response to the commission of very grave crimes in the past. In addition, the ICC, a permanent institution, is mandated to bring to trial those persons who are responsible for such crimes since 1 July 1992,³³ but also extending into the future. Either way, these mechanisms establish a framework in which the perpetrators of such crimes are held accountable for their actions. In this regard, it is important to take note of the rationales that underlie the sentencing practices of these mechanisms, and how they are compatible with powers of punishment that do not include the death penalty.

The jurisprudence of the ad hoc tribunals has principally focused on retribution and deterrence as the most significant rationales when determining the appropriate sentence for a convicted accused. In relation to retribution, this has generally been understood not to refer to a desire for revenge, but rather as a means of 'duly expressing the outrage of the international community at these crimes'.³⁴ Various commentators have long considered retribution to be a public reprobation,

33 See Rome Statute, Art 11(1). This is the date that the Rome Statute came into force. Of course, in most cases, the Rome Statute will only bind a state as from the time that it becomes a state party to the Rome Statute: see Art 11(2).

34 *Prosecutor v Aleksovski*, 2000, at [185] and fns. The prosecutor at the Nuremberg Military Tribunal, Robert H Jackson, argued that:

The satisfaction of instincts of revenge ... for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied case. [Quoted in Schabas 1997, 500.]

Of course, the Nuremberg Military Tribunal imposed the death penalty, but the expression of world outrage in response to the commission of international crimes has changed since that time, consistent with the evolution of international human rights principles regarding the prohibition of the death penalty.

condemnation and stigmatisation of the acts of the perpetrator, as an affirmation of the norms of the international community (see, for example, Hart 1968, 235; Feinberg 1970, 98). These aims also supplement the overarching goal of these mechanisms — ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’ (Rome Statute, preamble, [5]) — and have also been woven into the jurisprudence of the ad hoc tribunals (see, for example, *Prosecutor v Kordić*, 2004, at [1081] and fn).

As noted, a (strongly) emerging norm of the international community, even at the same time that it has expressed its determination to more directly address international crimes, has been that the death penalty is no longer an acceptable punishment and is inconsistent with international human rights standards. The establishment of (stronger) international mechanisms of criminal justice, with broad jurisdictional and temporal mandates, coupled with the power of imposing significant prison sentences — but not the death penalty — satisfies both of these norms and broadly serves the goal of retribution.

In relation to the goal of deterrence, the ICTY has holds the view that ‘[t]he deterrent effect of punishment consists in discouraging the commission of similar crimes’ (*Prosecutor v Babić*, 2004, at [45], cited with approval by the ICTY Appeals Chamber in *Prosecutor v Blaškić*, 2004, at [678]).

Within this concept, the ad hoc tribunals have, at times, differentiated between ‘special deterrence’ and ‘general deterrence’ — the former relating to the specific accused and the latter aiming to discourage others from committing the same kind of crime (see, for example *Prosecutor v Blaškić*, at [678]). While this approach has been criticised (see, for example, Wise 2000, 267; Henham 2003, 88; for a detailed overview of the sentencing goals of the ad hoc tribunals, see Abels, forthcoming), it is generally agreed that the concept of general deterrence remains an important element in sentencing by international criminal justice mechanisms and that:

In the context of combating international crimes, deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law ... general deterrence is more accurately described as deterrence aimed at reintegrating potential perpetrators into the global society. [*Prosecutor v Kordić*, at [1078].]

It is argued that the power to impose a lengthy prison sentence in appropriate circumstances serves this purpose. In this sense, the structure of punishment under

international criminal law represents a process of strengthening norms — once again, this is supplemented by incorporating a range of penalties that are consistent with, rather than contrary to, current (generally accepted) values in relation to the prohibition of the death penalty.

Contrast with national criminal justice?

This process of internationalisation through the establishment of mechanisms of international justice does not necessarily equate to a ‘harmonisation’ of existing *national* criminal law principles,³⁵ including in relation to the death penalty. Rather, this internationalisation of justice recognises that there are certain norms of *international* criminal law that transcend national boundaries and, like fundamental human rights norms, these are regarded as universal in acceptance and thus should be universal in application. These are particularly reflected in the nature of the specific international crimes that exist, and also extend to the prohibition of the death penalty under *international* criminal justice.

By contrast, the specific domestic criminal laws — including the punishment regime — of any one state will depend, at least to a certain degree, on that country’s history, culture, political system and values and, as such, remain the exclusive domain of each state. In terms of the death penalty, the potential for a divergence of approach between international and national justice systems with respect to the appropriate sentence for a person convicted of an international crime(s) still remains. Although there is clearly an undeniable trend towards the abolition of the death penalty worldwide, as at the end of 2008, Amnesty International estimated that there were still 59 countries that retained the death penalty (Amnesty International 2009a, 8). Yet, it may be that international criminal justice could ultimately play a role in ‘shifting’ national law on the issue of the death penalty. This is illustrated by the case of Rwanda itself.

Both the ICTY and ICTR were set up as ‘UN subsidiary organs’ (Sarooshi 1999, 389) in response to specific events and were always intended to have a limited lifespan. As a result, additional procedures have, over time, been put in place within the framework of their respective statutes to more easily allow for the transfer of indictees and detainees from those *international* courts to *national* courts, where they could then be tried within an appropriate national criminal justice system for their alleged

35 Having said this, there is certainly an argument to suggest that, by its very nature, criminal law is an appropriate area of law to be the subject of a gradual process of harmonisation. This issue is, for example, the subject of much debate in the broader context of European integration within the European Union. There is much conjecture, however, as to what ‘harmonisation’ means (and should mean) in this context: see, for example, Klip 2006.

crimes. The ad hoc tribunals have, of course, always had concurrent jurisdiction with national courts, although they have operated under a principle of 'primacy' of jurisdiction.³⁶ However, additional provisions were incorporated into their respective Rules of Evidence and Procedure (RPE) to establish more specific guidelines for the transfer of cases back to national courts.

Given the exclusion of the death penalty from these mechanisms of international justice, it would have been inconceivable that the judges — who are responsible for drafting the RPE of these two tribunals — would have allowed for the transfer of persons to national jurisdictions where they could potentially be subject to the death penalty.

This was, of course, of particular relevance to indictees before the ICTR, given that the Rwandan national courts did, at the time, have the power to impose a sentence of death. Indeed, of the first 150 trials conducted under Rwandan domestic law for crimes committed during the genocide of 1994, some (unofficial) estimates are that approximately 40 per cent resulted in the imposition of a death sentence.

As a result, although not based on any express legal powers within the ICTR Statute, Rule 11 *bis* (A) of the ICTR RPE allows the ICTR to refer indictments currently before it to another (national) court in the following circumstances:

- (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:
 - (i) in whose territory the crime was committed; or
 - (ii) in which the accused was arrested; or
 - (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

36 Article 9(1) of the ICTY Statute stipulates that the ICTY and national courts have 'concurrent jurisdiction'. However, Art 9(2) expressly grants the ICTY 'primacy over national courts' and that, '[a]t any stage of the procedure, [it] may formally request national courts to defer' to its competence. The Appeals Chamber of the ICTY confirmed the legitimacy of its primacy in *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction), at [49]–[64]. Article 8(1) of the ICTR Statute also specifies that the ICTR and national courts have 'concurrent jurisdiction'. However, Art 8(2) of the ICTR Statute is expressed in broader terms than its counterpart in the ICTY Statute, specifying that the ICTR has 'primacy over the national courts of *all States*' (emphasis added). It has been suggested that this wording in the ICTR Statute, which was drafted subsequent to the ICTY Statute, reflected a broader consensus at that time among the United Nations Security Council as to the concept of primacy (Brown 1998, 402).

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

The terms of Rule 11 *bis* (A) of the ICTY RPE are broadly similar.³⁷ Both Rules also make it clear, however, that an indicted person cannot be transferred to a jurisdiction where the death penalty may be imposed or carried out. The ICTY RPE provide as follows:

- (B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and *that the death penalty will not be imposed or carried out*.
- (C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused. [ICTY RPE, Rule 11 *bis* (B) and (C); emphasis added.]

Likewise, the ICTR RPE provides:

- (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and *that the death penalty will not be imposed or carried out*. [ICTR RPE, Rule 11 *bis* (C); emphasis added.]

While, for the reasons noted above, the restriction on the death penalty was not a particularly contentious issue in relation to possible transfers to the national courts of those states that formerly comprised the Federal Republic of Yugoslavia, it was highly controversial in the case of Rwanda, which was concerned that it would not be able to exercise jurisdiction over (at least some) of those whom it regarded as the main perpetrators of the 1994 genocide.

Rwanda particularly objected to the possibility that the 'leaders' of the genocide, prosecuted before the ICTR or before the courts of another country, would escape the death penalty, while 'lower-level' perpetrators, who faced the courts in Rwanda,

³⁷ The chapeau of Rule 11 *bis* (A) of the ICTY RPE provides as follows:

- (A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the 'Referral Bench'), which solely and exclusively shall determine whether the case should be referred to the authorities of a State.

would be sentenced to death. At the time, one official was quoted as saying that this perceived 'mismatch' of justice 'is not conducive to national reconciliation on Rwanda' (Morris 1997).

Yet, for as long as Rwanda retained the death penalty within its domestic laws, this restriction effectively meant that no person could ever be transferred by the ICTR to face trial there. Given the relatively slow pace with which the ICTR was proceeding at the time (it has, in recent times, become more effective, particularly with the appointment by the United Nations Security Council of ad litem judges to sit on a specific trial(s) at both of the ad hoc tribunals), this has prompted other countries to seek to try indictees from the ICTR, although this has resulted in further strong criticism from the Rwandan Government (*BBC News* 2006).

Nonetheless, the virtual exclusion of the Rwandan national court system from prosecuting those initially indicted by the ICTR was an important reason why Rwanda ultimately agreed in 2007 to abolish the death penalty within its national laws. In this way, it overcame one of the preconditions for a transfer of the trial of ICTR indictees to its national system under Rule 11 *bis* (C). However, despite the fact that the death penalty is no longer a relevant issue, no ICTR indictee has to date had his or her trial transferred to Rwanda. This may result from concerns about the other precondition — whether such an accused would receive a fair trial in that country.³⁸

Concluding remarks

There has been a marked shift in approach regarding the death penalty in the process of internationalisation of criminal justice that has taken place since the 1990s, when compared to the first international attempts to implement a system of criminal justice

38 In this regard, see the recent UK High Court decision of *Brown aka Bajinja v Government of Rwanda and Secretary of State for the Home Department*, 2009, in which the court, in allowing an appeal by four Rwandans against a decision to extradite them to Rwanda to face trial for various alleged crimes arising from the events of 1994, made the following comments (at [120] and [121]):

We certainly cannot sanction extradition as a means of encouraging the Rwandan authorities to redouble their efforts to achieve a justice system that guarantees due process. That might serve a political aspiration, but would amount to denial of legal principle ... We have reached a firm conclusion as to the gravity of the problems that would face these appellants as regards witnesses if they were returned for trial in Rwanda. Those very problems do not promise well for the judiciary's impartiality and independence. The general evidence as to the nature of the Rwandan polity offers no better promise. When one adds all the particular evidence we have described touching the justice system, we are driven to conclude that if these appellants were returned there would be a real risk that they would suffer a flagrant denial of justice.

in the years immediately following the conclusion of the Second World War. None of the mechanisms of international criminal justice that have been established over the past 15 years have the power to impose the death penalty. Instead, the maximum sentence is usually life imprisonment. This is notwithstanding the fact that these tribunals typically have jurisdiction over what are generally regarded as the most serious crimes — those reflecting ‘unimaginable atrocities that deeply shock the conscience of humanity’ (Rome Statute, preamble, [2]).

There are a number of possible reasons why this change of attitude has occurred. These represent a mixture of what might be called ‘micro’ reasons — for example, the need to garner sufficient financial support for these mechanisms from as wide a range of states as possible — and, more importantly, some ‘macro’ reasons, which reflect the evolution of international human rights standards and the broader movement towards global abolition of the death penalty at the national level. Yet, it has been argued that the death penalty per se has not yet reached the point of being illegal at customary international law, although there is clearly momentum moving towards that end result.

In this regard, the structure of these mechanisms of international justice can also play a role. It has been argued that they are to be regarded as human rights ‘role models’ (see Abels, forthcoming; Schabas 1997, 516). In applying and interpreting the law, they now must be ‘consistent with internationally recognised human rights’ (Rome Statute, Art 21(3)) and, in doing so, may also influence the evolution of legal principles under national systems.

The Rwandan experience represents an interesting example of this. It is apparent that the structure of the ICTR — both in terms of not having the power to impose the death sentence, and also in terms of its inability to transfer indictees to countries that retain the death penalty — had an influential impact on the eventual decision by the Rwandan Government to abolish that sentence under its domestic law.

In a similar vein, the Special Court for Sierra Leone, whose seat is in that country,³⁹ does not have the power to impose the death penalty, even though, conversely, that penalty is still legal under the domestic laws of Sierra Leone. It is to be hoped that this may give added impetus towards moves in that country to ultimately abolish the death penalty.

39 However, the trial of the former President of Liberia, Charles Taylor, before that court is actually taking place at the premises of the ICC in The Hague. This is due to concerns about regional security, had the trial been held in Sierra Leone. Taylor was transferred to The Hague on 30 June 2006.

This certainly seems to be the case with respect to Lebanon; once again, an international tribunal, the Special Tribunal for Lebanon, has been established and, unlike the domestic law of that country, does not have the power to impose the death penalty. As noted above, there are currently moves being made towards the abolition of that sentence under the national laws of Lebanon.

These developments towards abolition are more than coincidental. There is a relationship between a country's direct exposure to the approach taken under international criminal justice and the ongoing development of its own national criminal justice system in terms of abolishing the death penalty. This does not work quickly, nor all the time, but the signs are there that there is a 'cause and effect'. In this way, the internationalisation of criminal justice might also be seen as a way of 'persuading' countries to acknowledge the irreversible momentum towards universal abolition of the death penalty. ●

References

International legal materials

Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, 19 January 1946, 1589 TIAS 3 (Tokyo Military Tribunal Charter)

Charter of the Nuremberg International Military Tribunal, annexed to the 1945 London Agreement for the Establishment of an International Military Tribunal, 8 August 1945, 82 UNTS 279 (Nuremberg Military Tribunal Charter)

Convention for the Creation of an International Criminal Court, LN Doc C.547(I).M.384(I).1937.V (opened for signature 16 November 1937) (1937 ICC Treaty)

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 8 ILM 68

Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948 Genocide Convention)

Council of Europe Resolution 1044 (1994)

European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (ECHR)

Rome Statute of the International Criminal Court, 2187 UNTS 3 (Rome Statute)

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, 33 ILM 1598 (ICTR Statute)

Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey, 1923, 28 LNTS 11

Treaty of Peace between the Allied and Associated Powers and Germany, 112 BFSP 317 (Treaty of Versailles)

Treaty of Sèvres, 1920, UKTS 11

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 UNTS 205

United Nations General Assembly Resolution 217A (III) (10 December 1948) on the Universal Declaration of Human Rights (UDHR)

United Nations General Assembly Resolution 260 (III) B (9 December 1948) on the prevention and punishment of the crime of genocide: study by the International Law Commission of the question of an international criminal jurisdiction

United Nations General Assembly Resolution 489 (V) (12 December 1950) on international criminal jurisdiction

United Nations General Assembly Resolution 897 (IX) (4 December 1954) on the Draft Code of Offences Against the Peace and Security of Mankind

United Nations General Assembly Resolution 898 (IX) (14 December 1954) on the international criminal jurisdiction

United Nations General Assembly Resolution 2712 (XXV) (9 December 1970) on the question of the punishment of war criminals and of persons who have committed crimes against humanity

United Nations General Assembly Resolution 44/128 (15 December 1989) on elaboration of a 2nd optional protocol to the international covenant on civil and political rights aiming at the abolition of the death penalty

United Nations General Assembly Resolution 62/149 (18 December 2007) on a moratorium on the use of the death penalty

United Nations General Assembly Resolution 63/168 (18 December 2007) on a moratorium on the use of the death penalty

United Nations Security Council Resolution 827 (25 May 1993) on the establishment of an international tribunal with regard to the former Yugoslavia

United Nations Security Council Resolution 955 (8 November 1994) on the establishment of an international tribunal and adoption of the statute of the tribunal

Cases

Attorney-General of the Government of Israel v Eichmann (1961) 36 ILR 5

Brown aka Bajinja v Government of Rwanda and Secretary of State for Home Department [2009] EWHC 770 (Case No CO/6247/2008, 8 April 2009)

Eichmann v Attorney-General of the Government of Israel (1962) 36 ILR 277

Federal Republic of Germany v Denmark and Federal Republic of Germany v The Netherlands [1969] ICJ Rep 3 (*North Sea Continental Shelf* cases)

Fédération National des Déportées et Internés Résistants et Patriots v Barbie (1988) 100 ILR 330

Libyan Arab Jamahiriya v Malta [1985] ICJ Rep (*Continental Shelf* case)

Prosecutor v Akayesu, Case No ICTR-96-4-T, Trial Chamber, 2 September 1998

Prosecutor v Aleksovski, Case No IT-95-14/1-A, Appeals Chamber, 24 March 2000

Prosecutor v Babić, Case No IT-03-72-S, Trial Chamber I, 29 June 2004

Prosecutor v Blaškić, Case No IT-95-14-A, Appeals Chamber, 29 July 2004

- Prosecutor v Kanyabashi*, Case No ICTR-96-15-T, Trial Chamber II, 18 June 1997
- Prosecutor v Kordić*, Case No IT-95-14/2-A, Appeals Chamber, 17 December 2004
- Prosecutor v Kristić*, Case No IT-98-33-A, Appeals Chamber, 19 April 2004
- Prosecutor v Kunarac*, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001
- Prosecutor v Rajić*, Case No IT-95-12-S, Trial Chamber I, 8 May 2006
- Prosecutor v Stakić*, Case No IT-97-24-T, Trial Chamber II, 31 July 2003
- Prosecutor v Stakić*, Case No IT-97-24-A, Appeals Chamber II, 22 March 2006
- Prosecutor v Tadić*, Case No IT-94-1, Appeals Chamber, 2 October 1995
- Soering v United Kingdom* (1989) 11 EHRR 439

Other references

- Abels D (forthcoming) 'Commentary on the *Rugambarara* sentencing judgement', in A Klip and G Sluiter (eds) *Annotated Leading Cases of International Criminal Tribunals, Volume XXV, The International Criminal Tribunal for Rwanda* (copy with author)
- American Law Institute (1987) *Restatement of the Law: Third Restatement of US Foreign Relations Law*, vol 2, American Law Institute
- Amnesty International (2008) 'List of abolitionist and retentionist countries' Online [Available:] <www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> [2009, August 24]
- Amnesty International (2009a) 'Death sentences and executions in 2008', March
- Amnesty International (2009b) 28(3) *Human Rights Defender*
- BBC News (2006) 'Rwandan anger at suspect transfer', 16 February [Online] Available: <<http://bbc.co.uk>> [2006, May 18]
- Brown BS (1998) 'Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals' 23 *The Yale Journal of International Law*



Cash H (2007) 'Security Council Resolution 1593 and conflicting principles of international law: how the future of the International Criminal Court is at stake' 45 *Brandeis Law Journal*

Cherif Bassiouni M (1998) 'Introduction to the symposium: the normative framework of international humanitarian law: overlaps, gaps and ambiguities' 8 *Transnational Law and Contemporary Problems*

Crawford J (2003) 'The drafting of the Rome Statute', in P Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press

Cryer R, Friman H, Robinson D and Wilmschurst E (2007) *An Introduction to International Criminal Law and Procedure* Cambridge University Press

Feinberg J (1970) *Doing and Deserving: Essays in the Theory of Responsibility*

Freeland S (2006) 'Saddam trial underlines need to take tough stand on genocide' *The Canberra Times* 29 August p 11

Hart H L A (1968) *Punishment and Responsibility: Essays in the Philosophy of Law* Clarendon Press, Oxford

Henham R (2003) 'Some issues for sentencing in the International Criminal Court' 52 *International and Comparative Law Quarterly*

Hudson M O (1938) Editorial Comment, 'The proposed International Criminal Court' 32(3) *The American Journal of International Law* pp 549-54

International Law Commission (ILC) (1951) 'The Draft Code of Offences Against the Peace and Security of Mankind', in *Yearbook of the International Law Commission*, vol 1

International Law Commission (ILC) (1954) 'The Draft Code of Offences Against the Peace and Security of Mankind', in *Yearbook of the International Law Commission*, vol 2, 30 April, ILC Doc A/CN.4/85

Jørgensen N H B (2000) *The Responsibility of States for International Crimes* Oxford University Press

Kalivretakis E I (2001) 'Are nuclear weapons above the law? A look at the International Criminal Court and the prohibited weapons category' 15 *Emory International Law Review*



Klip A (2006) 'European integration and harmonisation and criminal law' in D M Curtin et al, *European Integration and Law* Intersentia, Antwerp and Oxford, pp 109–53

Koppe E V (2006) *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* Hart Publishing, Oxford

Mettraux G (2009) 'A Nuremberg for Guantánamo' *The New York Times* 19 August [Online] Available: <www.nytimes.com/2009/08/20/opinion/20mettraux.html?_r=1&emc=eta1> [2009, August 24]

Morris M H (1997) 'The trials of concurrent jurisdiction: the case of Rwanda — justice in the wake of genocide' *American Diplomacy* [Online] Available: <www.unc.edu> [2006, May 18]

Mullins C (1921) *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* H F & G Witherby, London

Ochoa C (2007) 'The individual and customary international law formation' 48 *Virginia Journal of International Law*

Overy R (2003) 'The Nuremberg trials: international law in the making', in P Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press

Sarooshi D (1999) 'The statute of the International Criminal Court' 48 *International and Comparative Law Quarterly*

Schabas W A (1997) 'Sentencing by international tribunals: a human rights approach' 7 *Duke Journal of Comparative and International Law*

Schabas W A (2001) *An Introduction to the International Criminal Court* Cambridge University Press

United Nations General Assembly (2009) 'Implementing the responsibility to protect: report of the Secretary-General', 12 January, UN Doc A/63/677

Vaswani K (2009) 'Still no justice in East Timor' *BBC News* 27 August [Online] Available: <<http://news.bbc.co.uk/2/hi/asia-pacific/8223686.stm>> [2009, August 27]